

SANTA FE SAND AND GRAVEL CO., INC.

A-30657

Decided

APR 25 1967 22

Contracts: Disputes and Remedies: Damages: Liquidated Damages--
Materials Act

Where a provision in a sales contract under the Materials Act provides that the purchaser may be charged triple the contract price for materials removed after the contract has terminated, it is proper for the contracting officer to require the purchaser to pay as liquidated damages triple the contract price for material taken in excess of the amount authorized by the contract.

Contracts: Disputes and Remedies: Damages: Liquidated Damages--
Contracts: Disputes and Remedies: Damages: Measurement--Materials
Act--Trespass: Measure of Damages

Considerations such as the willfulness or innocence of the trespasser which may be applicable in measuring the damages in an ordinary tort trespass case may not be pertinent where damages for the unauthorized removal of sand and gravel from Federal lands are assessed pursuant to a liquidated damages provision in a contract under the Materials Act providing for the sale of a specified amount of sand and gravel.



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

A-30657

: New Mexico Misc. 1100
: New Mexico 0450814

Santa Fe Sand and Gravel Co., Inc.

: Damages assessed for
: excess sand and gravel
: removal under materials
: sales contract

: Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Santa Fe Sand and Gravel Co., Inc., has appealed to the Secretary of the Interior from a decision by the Chief, Branch of Mineral Appeals, Office of Appeals and Hearings, Bureau of Land Management, dated May 16, 1966, which affirmed action by the Bureau's State Director for New Mexico assessing damages in the amount of \$2,530 for the unauthorized removal of 8,332 cubic yards of sand and gravel in excess of that sold to it under mineral material purchase contract New Mexico 0450814.

The contract, authorized under the Materials Act of July 31, 1947, 61 Stat. 681, as amended, 30 U.S.C. §§ 601-604 (1964), is dated August 5, 1963. It provided for the purchase by the appellant of an estimated 20,000 cubic yards of sand and gravel at a unit price of 10.125 cents per cubic yard, making a total estimated price of \$2,025, which was paid in full at the time the contract was executed. The contract was to expire 2 years from the date of approval unless an extension of time was granted. Section 4 of the contract provided that the rights of the purchaser would be subject to certain regulations, to certain sections on pages 3 and 4 of the contract form, and to special provisions which were attached. One of these special provisions, No. 4, required the company to submit a monthly report stating the number of cubic yards removed, if any. Reports submitted to the Bureau showed that 8,332 cubic yards in excess of the contracted amount had been removed from the land. In assessing the amount of damages due to the United States for that overage the Bureau charged triple the contract price for the material. Its position is that the contract itself requires such an assessment under the following special provisions:

"6. This contract shall terminate automatically when 20,000 cubic yards of sand and gravel has been extracted and removed from the contract area if prior to the contract period of Section 6.

7. Materials severed, extracted or removed by the purchaser after contract is terminated will be considered willful trespass, and purchaser may be charged triple the contract price or at triple the reappraised unit price if reappraisal has been made under the provisions of Section 25."

Upon demand by the State Director for the \$2,530 the appellant tendered that amount under protest and thereafter appealed to the Director, Bureau of Land Management, but its request that it be charged only the contract price for the materials taken in excess was rejected. The appeal decision emphasized that the provision of special clause No. 7 was mandatory in prescribing that excess removal "will be considered willful trespass," and that the State Director had no discretion to modify the contract by charging less than triple the contract price.

The appellant contends that the Bureau erred in its conclusion that the language is mandatory rather than discretionary. It contends that the question presented is not one of modification of the contract, but the interpretation and meaning of the contract. It asserts that there is no evidence that the appellant ever agreed to pay triple damages for an innocent trespass except under the Director's interpretation of the contract. It contends that the plain and fair meaning of the contract is that the levying of triple damages is discretionary, and that traditionally triple damages are levied dependent upon the willfulness or innocence of the party. Appellant refers to its brief to the Director, wherein it asserted that the excess removal had been innocently made in good faith. It also asserted that in accordance with policy and the necessity to discourage trespasses it is proper for the Department to presume a trespass to be willful and intentional, but that the trespasser has always been accorded the chance to meet the burden of establishing to the contrary by the required quantum of evidence, citing the following cases: Liberty Bell Gold Mining Co. v. Smuggler-Union Mining Co., 203 Fed. 795 (8th Cir. 1913); Elkhorn-Hazard Coal Co. v. Kentucky River Coal Corp., 20 F.2d 67 (6th Cir. 1927); United States v. Ute Coal and Coke Company, 158 Fed. 20 (8th Cir. 1907); United States v. Wyoming, 331 U.S. 440 (1947), rehearing denied, 332 U.S. 787. These cases all involve actions for trespass in the absence of contractual provisions. They do establish that the burden of proof is upon the alleged trespasser to establish his good faith and innocence in actions where the law distinguishes between willful and innocent trespass in determining the proper measure of damages.

Appellant contends that, in New Mexico, exemplary or punitive damages may be awarded upon a breach of contract only if there is an element of deceit or intention to defraud, citing Stewart v. Potter, 44 N.M. 460, 466, 104 P.2d 736 (1940), a case dealing with a misrepresentation made in a sale of an automobile. However, no special contract provision relating to damages was involved.

Appellant has also asserted that provisions for triple damages, which are in the nature of a penalty, must be strictly construed for their purpose is to subject a wrongdoer to extraordinary liability by way of punishment for a willful or evil design, citing 15 Am. Jur., Damages § 300 (1938). This citation refers generally to a discussion of statutes providing for double or treble damages. See the later discussion in 22 Am. Jur. 2d Damages § 267 (1965).

In attacking the assessment made by the Bureau, the appellant has thus referred to three different types of situations applying a measure for awarding damages. The first group of cases involves damages for trespass in tort actions. If this were an ordinary tort trespass case, under Departmental regulations State laws would be looked at to determine the measure of damages. See 43 CFR 9239.0-8. Appellant has not indicated what the measure of damages would be for a trespass removal of sand and gravel in New Mexico, although it suggests that there would be a distinction between an innocent trespasser and a willful trespasser. There have been at least four approaches suggested by decisions from various States as to the measure of damages for the removal of sand and gravel. These are discussed in 22 Am. Jur. 2d Damages § 144 (1965). One approach allows the owner of the land to recover the difference in value of the land immediately before and immediately after the removal, at least if the injury to the land is permanent. A second approach relies on the value of the material taken. The element of the trespasser's good or bad faith may be considered to determine when the valuation should be made, i.e., whether there will be any reduction for the cost of labor and other expenses. This is the most usual approach involving mineral trespass and was followed in a New Mexico case involving the removal of copper ore from a mine. Alvarado Min. & Mining Co. v. Warnock, 25 N.M. 694, 187 Pac. 542 (1919). A third approach is to determine the cost of replacing the material removed or restoring the lot to its former condition. A fourth approach is to allow recovery of both the value of the sand and gravel taken, and the amount of the diminution of the value of the land or expense of restoring it.

In a trespass case involving flood damage to fruit and nut trees, vines and crops, the New Mexico Supreme Court emphasized that the direct damage to the land owner is the most important criterion, but several approaches could be used, - the difference in value of land before and after the tortious act, or the value of the trees destroyed. Mogollon Gold and Copper Co. v. Staut, 14 N.M. 245, 91 Pac. 724 (1907). No case has come to my attention as to whether the New Mexico courts in a sand and gravel case would use one approach or another, or might sanction using several as suggested by the Mogollon case. As to State-owned land, there is a penal statute providing that anyone who removes stone, minerals, or other natural deposits from State-owned land shall be deemed guilty of a misdemeanor and fined, and also shall forfeit and pay to the State an

amount double the value of the material cut, removed, destroyed, injured or extracted. 2 New Mexico Stats. Anno. § 7-7-4 (1953).

However, this is not a case where State law must be resorted to in order to determine what the proper assessment should be since it is a case involving an interpretation of a contract made under a Federal statute. Cf. United States v. LeRay Dyal Co., 186 F.2d 460 (3rd Cir. 1950). The contract was authorized by the Materials Act which provides that:

"The Secretary, under such rules and regulations as he may prescribe, may dispose of mineral materials * * *. Such materials may be disposed of only in accordance with the provisions of this Act and upon the payment of adequate compensation therefor, to be determined by the Secretary * * *."

This clearly establishes the authority of the Secretary to establish what payment shall be made for the minerals. This leads to a matter raised by the appellant in his brief to the Director, as to whether the special clauses in the contract could be inserted in view of regulation 43 CFR 3611.8-2 pertaining to contracts under the Materials Act, which indicates that sales are to be made on contract forms authorized by the Director, Bureau of Land Management, and that:

"the authorized officer may include additional provisions in the contract to cover conditions peculiar to the sale area, such as road construction, protection of improvements, and watersheds and recreational values."

The decision below correctly pointed out that the listing of particular conditions in the regulation merely set forth examples and was not all inclusive. Certainly, the matter of damages in the event of a breach of contract is something that may be significantly different depending upon local conditions. For example, if there are limited reserves of sand and gravel in an area, the appraised sales price for the gravel removed may not reflect the investment value and the long-range impact of its loss, and the removal may not be consonant with sound principles of conservation. The different approaches discussed above which are used to determine a measure of damages for a tort trespass suggest some of the problems and difficulties inherent in determining what an adequate compensation should be. There was authority for the contracting officer to insert the special provisions.

There is some authority that the insertion of a requirement of payment of a specified sum in a Governmental contract in the event of the other party's breach may be considered in the nature of a

statutory penalty for nonperformance of a duty enjoined by law and enforced. See 22 Am. Jur. 2d Damages § 231, p. 317. In other words, here the provisions in the contract can be considered as special rules of the Department similar in effect to regulations promulgated under the authority of the Materials Act. Even if considered in the nature of a penalty, a provision for treble damages is sanctioned by the statutory authority which forbids removal of deposits except as provided by rules and regulations of the Department. Where there is a direct rule of double or treble damages authorized by statute, the question of the wrongdoer's intent may not be relevant depending upon the language and intent of the particular statute involved. See cases discussed in the note at 111 ALR 79, and Fredericksen v. Snohomish County, 67 P.2d 886 (Wash. 1937).

Generally clauses in contracts construed as acting "in terrorem" of performance are held to be unenforceable as penalties, and no sum can be recovered or allowed other than that which will compensate for the actual loss sustained and proved. 22 Am. Jur. 2d Damages § 235; Chester C. Gibby, 71 I.D. 247 (1964). It may be, however, that a provision in a contract which provides for a definite rental or price for land usage or price for a product of the land, with a much higher price in the event the land is used more than a maximum established by the contract will be construed simply as a second price established by the contract for the type of usage, and not as either a penalty or liquidated damages. See Kirby v. United States, 260 U.S. 423 (1922), pertaining to cattle grazing. If, however, the provision is considered as fixing an estimate made by the parties to the contract at the time the contract is entered into of the extent of the injury which a breach of the contract will cause by establishing a sum certain, it may be upheld as liquidated damages and no proof that damages were actually greater or lesser than that amount is necessary. Gibby, supra. In Fraser v. United States, 261 F.2d 282 (9th Cir. 1958), a grazer had been granted a permit to graze a specific number of cattle on Indian lands held in trust by the United States. Attached to the permit was a special range stipulation that if the number of cattle exceeded the prescribed number the permittee "will be required to pay in addition to regular charges as provided in the permit, a penalty equal to 50 per cent thereof for such excess stock." The Court held that this special stipulation was not a penalty but was in reality a liquidated damage provision, that the double charge was a reasonable forecast of just compensation for the harm caused by the breach of the permit because the damage caused by overstocking the land was incapable or extremely difficult of accurate estimation.

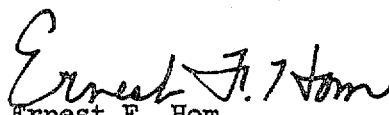
I believe that the provision in the present case also is most properly interpreted as a provision for liquidated damages in the event of a breach of the contract by the purchaser taking more than the contracted amount of material. Although there must be a "sum certain" agreed upon in a liquidated damages provision, the provision here provides

for a sum as ascertainable as that provided for in the Fraser case, with the total amount of the damages relating to the extent of the breach, i.e., in Fraser to the number of excess cattle grazed, in this case related to the amount of material removed in excess of the contract amount.

The appellant, however, contends that there is no evidence that it agreed to pay "triple damages" for an "innocent trespass." The evidence as to the agreement is the language of the contract. Although the language of special clause No. 7 is rather ungrammatical and speaks in terms of damages for trespass, it does convey an unmistakable meaning - that triple the contract price will be the amount which may be charged in the event of overage. Even if the word "may" in the clause is interpreted as allowing some discretion, as appellant contends, the discretion as to the amount of the damages is left with the seller with a maximum amount established - and not with the purchaser to pay less than the maximum amount. Any party having a contractual right to demand a certain sum of money from another has discretion to accept less than that amount as full payment. However, the other party has no right to demand any reduction in payment. The situation here appears no different.

As discussed previously with respect to ascertaining damages for tort trespass, it may be difficult to ascertain the complete extent of the damages here, and they may not necessarily be related to the contract price of the material. Therefore, triple the contract price for the materials removed in excess does not appear to be an unreasonable forecast of possible damage. With the determination that the provision is for liquidated damages, it is unnecessary to consider what the actual damages are, or appellant's intent in removing the excess materials, a consideration pertinent in an ordinary tort trespass, since they are not pertinent. Even so, we may add, despite appellant's protestations of innocence, the amount of material taken in excess was more than one-third the total contract amount. Such an error is a gross error, and if made as appellant alleges, as a result of a bookkeeping error during a change in the corporation it must still be viewed at least, as gross negligence. Thus, even if the contracting officer has the discretion to reduce the amount of damages, I cannot conclude that such discretion should have been exercised in this case.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.


Ernest F. Horn
Assistant Solicitor
Land Appeals